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No. 97-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

v.

FIBREBOARD CORP., *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant litigation. It is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project to monitor, expose, and prevent abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about increasing efforts by corporate defendants to create mandatory, no-opt-out settlements that would deprive mass tort victims -- including unknown *future* mass tort victims -- of their constitutional rights to pursue individual damages litigation. TLPJ submits this brief to urge the Court to reject this tactic and make clear that Rule 23(b)(1)(B) cannot be used to force a company's present and future mass tort personal injury victims to forfeit their rights to pursue individual damages claims, while leaving all of the company's other present and future victims' and creditors' rights wholly unfettered.

STATEMENT

The facts of this case are extremely complex and exhaustively set forth in the submissions of the parties. For the purposes of this

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[1]Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

brief, however, only a few key facts are needed to illustrate why the settlement class in this case should not have been certified:

* The class action settlement at issue in this case arose from the financial problems of the Fibreboard Corporation. Fibreboard faced asbestos claims well in excess of its assets and, at the time the settlement was reached, was engaged in a lengthy coverage dispute with its insurers.

* In an effort to resolve all of its problems at once, Fibreboard entered into a proposed no-opt-out global settlement that, if approved, would allow its insurers to establish a $1.525 billion settlement fund, leave Fibreboard's assets intact, and force the class members (all present and future asbestos personal injury victims filing claims after August 27, 1993) to seek compensation through a private, claims processing system. Under the system, class members would receive offers to settle their claims, based in large part on the severity of their injuries. If the class members did not agree to accept the amount offered, they could go through mediation and, after that, arbitration. If they were still unsatisfied, they could then file a tort suit, subject to an overall limitation of $500,000 in compensatory damages. Punitive damages, prejudgment interest, and post-judgment interest would not be recoverable. The class members would not be permitted to seek compensation from Fibreboard, which, according to the evidence introduced below, would walk away with a net worth of approximately $235 million. *See* Appendix to Petition for Writ of Certiorari ("App.") at 13a.[2]

* The class does not include all persons with present or future claims against Fibreboard. By its terms, the class does not include any asbestos personal injury claimants who filed their claims prior to August 27, 1993, any asbestos property damage claimants, and any other tort claimants or creditors with claims against either

[2]Since the settlement, Fibreboard has been sold for $515 million. *See* App. at 13a.

Fibreboard or its insurance policies. These claimants and creditors -- and all other present and future claimants and creditors -- would be free to proceed against Fibreboard in the tort system, with no external limitations on the amount they may seek to recover.

The class in this case does, however, include the unaccrued future personal injury claims of hundreds of thousands of individuals who may not even know that they were even exposed to asbestos, much less that their future claims are being resolved in this class action. The class also includes thousands of individuals whose membership in the class is currently unknown and unknowable (either because no one currently knows of their exposure to Fibreboard's asbestos or because they will not become class members until some time in the future, when they marry a person previously exposed to Fibreboard's asbestos). In addition, the class includes thousands of individuals who do not yet exist -- future spouses and children of class members. All of these individuals' rights are affected by this class action settlement.

SUMMARY OF ARGUMENT

In an ordinary class action suit "wholly or predominantly for money damages," class members must be afforded a full and unfettered right to exclude themselves from the class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985); Fed. R. Civ. P. 23(b)(3) and (c)(2). Similarly, in an ordinary class action suit for damages, the unaccrued claims of "future victims" may not properly be pursued, much less settled.

This, however, is no ordinary class action. It began with the appointment of class counsel by a trial judge who urged the lawyers to negotiate a global settlement of cases that had not yet been filed and on behalf of clients who had not yet retained them. *See* App. at 45a. It seeks to settle on a class wide basis claims that the parties never intended to litigate -- and that, in truth, no parties ever *could* litigate. It selects a subset of individuals with present

and future claims -- asbestos personal injury victims who had not filed claims by August 27, 1993 -- and attempts to bar them (and them alone) on a no-opt-out basis from pursuing their claims against the defendant. And it seeks to limit the *future* unaccrued claims of literally hundreds of thousands of individuals who have been exposed to asbestos -- and may not even know it -- as well as those class members' future spouses and children.

The settling parties recognize that this case is extraordinary in all of these respects. Nevertheless, they claim that, under the unusual circumstances of this case, a no-opt-out settlement class that includes present and future mass tort personal injury victims can properly be certified under Rule 23(b)(1)(B) because there is a risk that, absent a mandatory class settlement, individual adjudications will result in an unfair preference for early claimants at the expense of later claimants.

This justification, however, does not withstand scrutiny. Rule 23(b)(1)(B) is designed to protect class members from the risk that their ability to obtain relief from a defendant will be "substantially impaired" by separate prosecution of class members' claims. The rationale for depriving class members of their right to opt out when Rule 23(b)(1)(B)'s criteria are met is that the class members' ability to obtain relief from the defendant will be affected *whether or not* the class is certified. If that is so, then certifying the class is the only way to protect the class members' interests and ensure that all who are subject to the risk of "substantial impairment" have a fair opportunity to obtain relief from the defendant.

When Rule 23(b)(1)(B) is properly applied, it achieves this goal by ensuring that two conditions are met: (1) that all those with claims in risk of "substantial impairment" are included in the proceeding and (2) that the subject of the competing claims is available for just distribution in the proceeding. In this case, however, neither of those conditions have been met.

First, this class action does *not* include all persons who share the risk that individual prosecution of separate actions will "substantially impair" their ability to recover from the defendant. To the contrary, the certified class is woefully underinclusive: it includes some present and all future asbestos personal injury claimants, but does not include other present asbestos personal injury claimants, non-asbestos present or future personal injury claimants, property damage claimants, contract claimants, or any other present or future creditors. As a result, separate actions will continue to be prosecuted against Fibreboard by those who share the same risk of "substantial impairment" in regard to it as the class members do. In this sense, the settlement class certification actually works to the *detriment* of class members -- because they are precluded from asserting their claims against Fibreboard, while similarly situated claimants outside of the class are free to sue Fibreboard without limitation.

Second, the subject of the competing claims is *not* available for just distribution in this proceeding. Indeed, the entire purpose of this proceeding is to make the subject of these claims -- Fibreboard's assets -- utterly *unavailable* to the class members. Under the settlement, the class members are receiving virtually no recovery *from Fibreboard* in exchange for the release of their claims. Thus, instead of protecting class members from the risk that their ability to obtain relief from Fibreboard will be "substantially impaired," certification of the proposed settlement class here ensures that the class members' ability to obtain relief from Fibreboard will be almost totally *eliminated*. *See* App. at 107a (J. Smith dissenting). Rule 23(b)(1)(B) has been turned on its head.

Even if these defects in the Rule 23(b)(1)(B) certification could somehow be overlooked and a no-opt-out class could be permitted, the inclusion of future personal injury victims' claims in the class renders the settlement unconstitutional. The proposed settlement violates the rights of future victims in two distinct ways.

First, the settlement cannot be reconciled with the class members' constitutionally mandated right to receive meaningful notice and an opportunity to be heard. It is well settled that due process requires that class members be afforded an opportunity to present their objections to a settlement that releases their claims. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Plainly, this constitutionally-mandated requirement, protected by Rule 23(e), cannot be met by the class settlement in this case, which attempts to release the claims of hundreds of thousands of future victims who have no way of knowing that they are included in the class. Indeed, this Court recognized the "highly problematic" impediments to adequate notice in class actions involving future asbestos victims just last term. *See Amchem v. Windsor*, 117 S. Ct. 2231, 2252 (1997).

Second, the proposed settlement violates the future victims' constitutional right to adequacy of representation, which is protected by Rule 23(a)(4). As this Court's recent decision in *Amchem* makes clear, Rule 23(a)(4)'s adequacy of representation requirement could never be met in a case of this sort. Like *Amchem*, the proposed settlement class in this case encompasses a huge number of present and future personal injury victims who have fatally conflicting interests in the distribution of the settlement proceeds. *See Amchem*, 117 S. Ct. at 2250-51. Equally important, the class representatives in this case lacked authority to release the future personal injury claims of exposure-only class members. It is axiomatic that class representatives' authority is limited to the claims they possess in common with other members of the class. This principle is clearly violated in a case where -- as here -- the settlement seeks to extinguish future personal injury claims that, by their very nature, do not exist.

Thus, the settlement class in this case must be overturned. It was not properly certified under Rule 23(b)(1)(B) and the inclusion of future personal injury claims in the class renders it unconstitutional.

ARGUMENT

I. RULE 23(b)(1)(B) DOES NOT ALLOW A DEFENDANT TO PREVENT SOME OF ITS PRESENT AND FUTURE MASS TORT VICTIMS FROM PURSUING CLAIMS AGAINST IT, WHILE LEAVING THE RIGHTS OF ALL OTHER PRESENT AND FUTURE CLAIMANTS AGAINST IT UNFETTERED.

In an ordinary class action for money damages, due process requires that class members be permitted an opportunity to opt out. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811 n.3. In this case, however, the parties contend that the settlement class can be certified on a no-opt-out basis because it meets the requirements of Federal Rule of Civil Procedure 23(b)(1)(B).

Rule 23(b)(1)(B) authorizes certification of a no-opt-out class only when

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of ...
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The purpose of this provision is to allow for a unitary adjudication in those limited circumstances where class members would be unfairly harmed if some class members attempted to pursue separate litigation against the defendant. *See* Herbert B. Newberg & Alba Conte, 1 *Newberg On Class Actions* ("*Newberg*") § 1.20 at 1-48 (3d ed. 1992). Thus, assuming that the other requirements of Rule 23 and the Constitution are satisfied, Rule 23(b)(1)(B) certification is appropriate when "claims are made by numerous persons against a fund insufficient

to satisfy all claims." Advisory Committee Notes to the 1966 Revision of Rule 23 ("Advisory Committee Notes"), 39 F.R.D. 69, 101 (1966). The reason is that class members' claims will be impaired *whether or not* the class is certified. Certification of an appropriate no-opt-out class action (with appropriate subclasses) protects all of the class members' competing claims equally. It ensures (1) that all those with claims subject to the risk of "substantial impairment" are included in the proceeding and (2) that the subject of the competing claims -- the insufficient fund -- is available for just distribution.[3]

For a class action certification under Rule 23(b)(1)(B) to be proper, therefore, two factual predicates must be met. First, the class action must include all persons whose separate actions create the risk of "substantial impairment" to the interests of the class members. Otherwise, certification fails to protect the class members from the risk Rule 23(b)(1)(B) was designed to address. It leaves those outside the class free to pursue individual litigation for theoretically unlimited amounts of money against the defendant, while permitting class members to recover only from an admittedly "insufficient fund."

Second, the subject of the competing claims must be available for just distribution among the class members. Otherwise, certification makes no sense; the class members are better off risking the outcome of separate prosecutions. In this case, however, neither of these factual predicates has been met.

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[3]An "insufficient fund" is often referred to as a "limited fund." Referring to an "insufficient fund" as a "limited fund," however, confuses the issue. Rule 23(b)(1)(B) focuses on whether the fund is "insufficient" -- i.e., too small to satisfy all claims -- not on whether the fund is "limited." All funds are, to some extent, limited. The Advisory Committee Notes do not speak of "limited funds"; the Notes say Rule 23(b) (1)(B) certification is appropriate when there are "fund[s]insufficient to satisfy all claims." 39 F.R.D. at 101.

A. Rule 23(b)(1)(B) Cannot Be Used to Certify a Class That Includes Only Some of the Individuals Whose Separate Prosecutions Create the Risk of "Substantial Impairment" to the Class.

For a Rule 23(b)(1)(B) class to achieve its purpose, the class must include all individuals and entities whose prosecution of separate claims are likely to impair the class members' interests. Otherwise, as the Third Circuit found in *In re School Asbestos*, the resulting "under-inclusive" class is critically flawed. 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 915 (1986).

In re School Asbestos involved an attempt by defendant asbestos-manufacturers to obtain certification of a mandatory, no-opt-out punitive damages class made up of school districts that sought compensation for asbestos property damage. *See id.* at 998. The Third Circuit assumed, without deciding, that there was sufficient justification for creation of a no-opt-out class for punitive damages under Rule 23(b)(1)(B). *See id.* at 1005. Nevertheless, the Court found that, even if such a mandatory class was permissible, the class certified by the district court could not withstand scrutiny because it failed to include numerous other claimants who were likely to seek punitive damages against the defendants. *See id.* The Third Circuit noted that an "under-inclusive" mandatory class necessarily results in a situation where "separate actions by those who should properly be included in the class will go forward." *Id.* at 1006. The Court reasoned that, since the suppression of such separate actions is a key reason for a 23(b)(1)(B) class, the exclusion of critical claimants was fatal to (b)(1)(B) certification. *See id.*

The proposed settlement at issue in this case suffers from the same defect. By its terms, the class excludes all asbestos personal injury claimants who filed their claims prior to August 27, 1993, all asbestos property damage claimants, and all other tort claimants and creditors with present or future claims against either Fibreboard or its insurance policies. *See* App. at 47a-48a (class

includes only those persons with asbestos-related personal injury and death claims who neither filed or settled their claims against Fibreboard before August 27, 1993). Although these people are excluded from the settlement, they are still permitted to proceed with their claims in the tort system. The prosecution of their claims against Fibreboard creates the same risk of "substantial impairment" as the prosecution of the class members' claims against Fibreboard. Since the suppression of such separate actions is the principal purpose of a 23(b)(1)(B) class, their exclusion from the mandatory class settlement in this case renders certification under (b)(1)(B) impossible. *See In Re School Asbestos*, 789 F.2d at 1006.[4]

As the Third Circuit noted in *In Re School Asbestos*, the effect of excluding other similarly situated claimants is to "single out" the class members for "special and possibly disadvantageous treatment." *Id.* at 1006. In this case, only the class members are precluded from suing Fibreboard and required to seek compensation through a private claims processing system. Only the class members are limited to $500,000 in compensatory damages. And only the class members must forego punitive damages, prejudgment interest and post-judgment interest. Those outside of the class -- including other asbestos personal injury claimants -- can seek all of this and more from Fibreboard. Yet, they and the class members share exactly the same risk that separate prosecution of their claims will "substantially impair"

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[4]In *In Re School Asbestos*, the Third Circuit expressed special concern about the exclusion of other property damage claimants. 789 F. 2d at 1005. Because the school districts that the defendants sought to bind into a mandatory class in *In Re School Asbestos* were also property damage claimants, it seemed especially egregious to treat the school districts differently. *See id.* at 1005 ("[t]he certified class does not even include all property damage claimants . . . Clearly [ ] this aspect of the litigation transcends the nation's classrooms.") Similarly, the proposed class in this case includes some, but not all, personal injury claimants against Fibreboard; those individuals who filed claims, but had not yet settled them, prior to August 27, 1993, are not bound by the settlement.

each others' ability to obtain relief from the company. There is simply no principled basis on which the under-inclusiveness of the settlement class can be justified.[5] As a result, certification was improper.

B. Rule 23 (b)(1)(B) Cannot Be Used to Certify a Settlement Class That Precludes Class Members from Obtaining *Any* Relief from the Defendant with the Allegedly Insufficient Funds.

Under the terms of the global settlement agreement at issue in this case, the insurers pay for virtually the entire settlement fund, while Fibreboard contributes no money to the settlement fund and is left with its assets intact.[6] Despite the fact that Fibreboard has agreed to contribute virtually *none* of its own assets to the settlement fund, the global settlement agreement releases both the insurers *and Fibreboard* from all asbestos-related personal injury claims asserted by class members. Because the class members have essentially obtained nothing from Fibreboard in exchange for the release of their claims, the lower courts erred in certifying the proposed settlement class under Rule 23(b)(1)(B).

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[5]In this respect, the proposed settlement is truly unprecedented. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 727 (E.D.N.Y. 1983), *aff'd*, 818 F. 2d 145, 1429 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (involving no-opt-out punitive damages class where *all* of the claims were concentrated in one case); *In re A.H. Robins*, 880 F.2d 709, 717 (4th Cir.), *cert. denied*, 439 U.S. 959 (1989) (where the tort victims' class action against the insurers included all Dalkon Shield claimants, not simply those with unfiled claims as of the date the class-wide litigation was filed).

[6] While the global settlement provides that Fibreboard will contribute $10 million to the settlement fund, the district court pointed out that this "contribution" is, in fact, the amount remaining from Fibreboard's settlement with another insurer. *See* App. at 205a. Moreover, even if this money is viewed as relief obtained from Fibreboard, that makes no difference. It is such an insignificant amount in the context of the litigation that the impropriety in certification remains the same: the class members are receiving dramatically less from Fibreboard than they would otherwise.

As we noted above, the key justification for Rule 23(b)(1)(B) classes is to ensure that class members will actually be able to preserve their ability to obtain a just portion of the "insufficient funds." In this case, however, inclusion of the class members in the settlement class *eliminated* the ability of the class members to seek, much less obtain, their fair share of compensation from Fibreboard. Instead of reducing the risk that Rule 23(b)(1)(B) is designed to address, this settlement class made it a certainty.

According to the record below, Fibreboard's net worth was approximately $235 million at the time of the settlement. *See* App. at 13a. Because the settlement allows Fibreboard to keep all of its assets intact, this substantial pool of assets continues to be available *outside* the settlement fund, *from Fibreboard*, to satisfy claims outside the settlement. On the other hand, once Fibreboard's contribution (or lack thereof) is separated from the insurers', it is clear that there is virtually *no* money available, *from Fibreboard*, *inside* the settlement fund. Since the class members would be hard-pressed to do any worse against Fibreboard "outside" of the settlement, there is no valid justification for precluding the class members from opting out of the class and pursuing their claims against Fibreboard.

In fact, once Fibreboard's and the insurers' situations are viewed separately, it is clear that the only alleged risk to the class members addressed by the Rule 23(b)(1)(B) certification is that posed by the insurance coverage dispute. Moreover, that risk is the *only* impairment risk for which relief is provided in the global settlement agreement. In other words, because Fibreboard has failed to make any meaningful contribution to the settlement agreement, class members are not compensated for any impairment risk that exists with regard to recovery from Fibreboard. As Judge Smith of the Fifth Circuit stated in his initial dissenting opinion in this case, "'the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right,'" App. at 99a (J. Smith dissenting), quoting John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass*

Tort Class Action ("*Class Wars*"), 95 Colum. L. Rev. 1343, 1420 (1995). Clearly, this is not a proper use of Rule 23(b)(1)(B).[7]

As the above discussion makes clear, even if Rule 23(b)(1)(B) could be utilized where multiple personal injury plaintiffs seek to prosecute claims against a defendant with insufficient funds, certification of the settlement class in this case was improper. Rule 23(b)(1)(B) authorizes certification of a no-opt-out class where the separate prosecution of claims against the defendant creates a risk that the class members' ability to obtain compensation will be "substantially impaired." If the class does not include all of the individuals whose claims create -- and are subject to -- the risk, it cannot be certified. Similarly, Rule 23(b)(1)(B) may not be used to preclude class members from obtaining *any* recovery from the defendant whose financial status creates the risk that class members will not be able to obtain full compensation.

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[7]The significance of Fibreboard's failure to make a reasonable contribution to the settlement fund in this case is confirmed by case law in the closely related area of interpleader actions. *See In Re Joint E. & S. Dist. Asbestos Litigation*, 134 F.R.D. 32, 38 (E. D. N. Y. 1990) ("[l]imited fund class actions closely resemble an interpleader action"); *Newberg* § 1.22, at 1-51 (mandatory classes in general are analogous to interpleader actions) and § 17.15 at 17-38 (the "paradigmatic" example of a Rule 23(b)(1)(B) "limited fund" is an interpleader situation involving competing claimants for limited insurance proceeds). In the interpleader context, it is plainly improper for a defendant-tortfeasor to obtain protection from prosecution on the sole basis that its insurer has filed an interpleader action against the tortfeasors' victims. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967); *see also Farmers Irrigating Ditch & Reservoir Co. v. Kane*, 845 F.2d 229, 232 (10th Cir. 1988) (fact that insurers sought action in interpleader does not "bootstrap" the tortfeasor; tortfeasor "must stand on its own two feet.") Similarly, Fibreboard cannot use Rule 23(b)(1)(B) to "bootstrap" itself onto what is, in practical reality, the insurers' attempt to reach a settlement with the asbestos claimants.

II. THE INCLUSION OF FUTURE PERSONAL INJURY CLAIMS IN THE CLASS RENDERS THE SETTLEMENT UNCONSTITUTIONAL.

While the no-opt-out certification of this class action is unprecedented and serious cause for alarm, the most notorious -- and constitutionally dangerous -- aspect of this case is its attempt to limit, in one fell swoop, the unaccrued *future* claims of literally hundreds of thousands of individuals who were exposed to asbestos -- and may not even know it. In this sense, this case (like the asbestos future victims' class action struck down by this Court last term in *Amchem*) represents the frightening pinnacle of attempts by defendants to use class actions as vehicles for capping their liability in damages actions.

Although other opt-out class action settlements have sought to encompass the "future" personal injury claims of mass tort victims, *see, e.g., Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valves), the classes in those cases have included persons who could plainly determine -- at the time of certification -- whether they are or are not class members, *i.e.*, whether they do or do not have heart valves. This class goes light years farther by attempting to simultaneously compromise the unaccrued future claims of hundreds of thousands of individuals who are entirely unaware that they have ever been exposed to a hazardous product, let alone that their rights are being extinguished in a class action settlement. If this unique and extraordinary class action is permitted to stand, it will serve as a green light for manufacturers and suppliers of insidiously dangerous products to use Rule 23 as a device for limiting the rights of their "future victims" before those individuals' claims ever accrue. That practice cannot be -- and is not -- constitutional.

Thus, even if a no-opt-out class somehow could be permitted in this case, the settlement class here would still be unconstitutional because it violates the due process rights of future victims in two distinct ways. First, the settlement cannot be reconciled with the future victims' constitutionally mandated right to receive

meaningful notice and the opportunity to be heard. Second, the settlement violates the future victims' constitutional right to receive adequate representation.

A. The Class Settlement Violates the Future Victims' Constitutionally-Mandated Rights to Receive Notice and Have the Opportunity to Be Heard.

In order to ensure that class members' due process rights are protected, Rule 23(e) imposes a *mandatory* notice requirement with respect to "the dismissal or compromise" of *all* class actions, including cases certified under Rule 23(b)(1)(B). *See Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 963 (3d Cir. 1983) (Rule 23(e) makes notice in Rule 23(b)(1) and (b)(2) class actions mandatory); Charles A. Wright, et al., 7B *Federal Practice and Procedure*, § 1797 at 365 (West, 2d ed. 1986). Whenever a proposed settlement is reached, the best notice practicable *must* be provided to *all* class members whose rights will be affected -- so they may appear and be heard *before* the proposed settlement becomes final. As one leading commentator has noted, the purpose of this mandatory notice requirement is to ensure that "absent class members are provided an opportunity to contest any action that they feel will adversely affect their rights." *Id.* at 359-60. Indeed, this Court has made clear that adequate notice and the "opportunity to be heard" are essential elements of due process in class action proceedings. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 810-13 & n.3; *Advisory Committee Notes*,39 F.R.D. at 107; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. at 313.

In *Mullane*, this Court stated that to satisfy the demands of due process, the notice to class members must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their objections*." *Mullane*, 339 U.S. at 314 (emphasis added). Clearly, this constitutionally-mandated requirement that class members be provided notice and an

opportunity to be heard can not be met here, where the class encompasses thousands of future victims who may have no way of knowing that they are included in this settlement.

Indeed, just last term this Court discussed the "highly problematic" impediments to adequate notice in a similar case involving a settlement class action that sought to release the claims of future asbestos victims. *See Amchem*, 117 S. Ct. at 2252; *see also Schweitzer v. Consolidated Rail Corp.*, 758 F. 2d 936, 944 (3d Cir.) (noting that adequacy of notice to potential future asbestos-injury claimants would, at the least, raise "thorny constitutional questions"), *cert. denied*, 474 U.S. 864 (1985). Although *Amchem* did not ultimately decide the issue of the adequacy of class notice for the class in that case, it echoed the observations of lower courts that many of the future victims in the class may not even have known of their asbestos exposure, or realized the extent of the harm they might incur. It also "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem*, 117 S. Ct. at 2252.

Notably, this Court's discussion of the impediments to adequate class notice in *Amchem* specifically cited Judge Smith's dissenting comments on the deficiencies of the class notice in *this* case. In the excerpt cited by this Court, Judge Smith wrote

> [c]ertification of futures-only class actions creates a massive potential for abuse. Many putative future claimants have manifested no symptoms and do not even know they were exposed. . . . Thus, the due process standbys -- *notice and an opportunity to be heard -- are meaningless to countless future claimants.*

App. at 115a (emphasis added).

As the italicized language suggests, even in a no-opt-out class, due process requires both notice and an opportunity to be heard -- requirements that could not be satisfied in this case in any meaningful fashion. Because many -- if not most -- of the future victims in the class had no way of knowing they were included in the settlement, the notice of settlement in this case fails to withstand constitutional muster.

For these reasons, this case cannot be reconciled with the constitutionally-mandated notice requirement that is embodied in Rule 23. This right was designed to give absent class members the ability to protect their own interests by objecting to a proposed settlement, which this Court has repeatedly recognized to be essential to satisfy the demands of due process. It simply cannot be met in any meaningful way by the settlement class in this case, which seeks to bind the *future* unaccrued claims of hundreds of thousands of individuals who have been exposed to asbestos but may not know it.

B. The Class Settlement Violates The Future Victims' Constitutionally-Mandated Right to Adequate Representation.

The second constitutional infirmity in the proposed settlement is that it deprives the future victims in the class of their due process right to adequate representation. According to Federal Rule 23(a)(4), the class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ.P. 23(a)(4). The drafters of the modern class action rule regarded this requirement as an essential safeguard of the due process rights of class members. *See* 7A *Federal Practice* § 1765, at 263. This Court has since repeatedly affirmed that adequacy of representation is a basic element of due process. *See, e.g., Shutts*, 472 U.S. at 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members" (citing *Hansberry v. Lee*, 311 U.S. 32 (1940))); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*,

S. Ct. 873, 875 (1996) ("adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members.") (Ginsburg, J., concurring). And just last term, this Court emphasized the importance of the adequacy of representation requirement in a similar case that sought to settle the claims of both present and future asbestos victims. *Amchem*, 117 S. Ct. at 2251.

In *Amchem*, this Court made clear that it did not intend to limit its adequacy-of-representation holding to "opt-out" class actions certified under Rule 23(b)(3). Notably, every case cited by *Amchem* to support its holding on this point involves a mandatory, no-opt-out class. 117 S. Ct. at 2250-51, citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) (mandatory employment discrimination class certified under Rule 23(b)(2)); *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) (same); *General Tel. Co. of the Northwest v. E.E.O.C.*, 446 U.S. 318 (1980) (same); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992) (mandatory asbestos victims class certified under Rule 23(b)(1)(B)), *modified on reh'g on other grounds sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993)).

In re Joint Eastern and Southern Dist. Asbestos Litig., relied upon in *Amchem*, is particularly applicable here. Like this case, that decision involved a mandatory, "limited fund" class action certified under Rule 23(b)(1)(B) that included both present and future personal injury victims. *See* 982 F.2d at 728, 735.[8] The Second Circuit vacated the class certification order on the ground

[8] We note, however, that for purposes of invoking Rule 23(b)(1)(B), there is a very important difference between this case and *In re Joint Eastern and Southern District Asbestos Litig.* There, the class settlement served solely to restructure an existing bankruptcy trust. That trust was a "*res*" which the court could equitably distribute without abridging any substantive rights. Here, however, no such pre-existing *res* exists to support certification under Rule 23(b)(1)(B).

that conflicts between various segments of the class rendered the named plaintiffs incapable of satisfying Rule 23(a)(4)'s adequacy-of-representation requirement. *See id.* at 741-43. *Amchem* quotes from that decision extensively in support of its conclusion that intra-class conflicts rendered the named plaintiffs incapable of representing the class. *See* 117 S. Ct. at 2251. Thus, *Amchem* is dispositive on the applicability of the adequacy of representation requirement to mandatory classes.

In reality, the conflict-of-interest problems identified in *Amchem* are even *worse* in a case like this one, where the present and future class members' claims allegedly exceed the available assets. In *Amchem*, it was undisputed that the asbestos companies' assets would be sufficient to pay all claims under the settlement. *See* 117 S. Ct. at 2251. Yet this Court still rejected the certification due to impermissible conflicts between present and future victims. *See id.* In this case, in contrast, the settling parties contend that Fibreboard's liabilities far outstrip its assets. This means that the present and future victims lumped together in the class must battle it out for their share of an inadequate pool of assets – a true zero-sum game. *Amchem* acknowledged that the conflicts between present and future victims in a limited fund context would be at least as serious as those identified in the *Amchem* settlement. *See id.* (finding impermissible intra-class conflicts because, "*[a]lthough this is not a 'limited fund' case certified under Rule 23(b)(1)(B)*, the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability" (emphasis added)). Thus, this Court recognized – as logic dictates – that its analysis would apply with full force in the limited fund context, as well.

There is, moreover, another, equally compelling reason why the class representatives failed to adequately represent the class: the release of the absent class members' future claims violates the "most fundamental principles underlying class actions, [which] limit the powers of the class representatives to the claims they

possess in common with other members of the class."– Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 694 (1994). This restriction is rooted in the basic rationale underlying the adequacy-of-representation requirement: "the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 *Newberg* § 1.13, at 1-36.

By restricting class representatives' authority to claims that they hold in common with the entire class, the adequacy-of-representation requirement ensures that the class representatives will achieve the best result possible for the class. Thus, "[w]hen the class representative's claims are the same as or similar to those of the class members, the court may rely in part on the representative's self-interest in prosecuting those claims to protect the interests of the class members." 3 *Newberg* § 3.01, at 3-5.[9] Conversely, "[t]o the extent the plaintiff or class members also have unique individual claims, the plaintiff cannot adequately represent the class on uncommon claims, nor will the adjudication of common issues affect or be binding on the individual uncommon claims possessed by the plaintiff or class members." *Id.* § 1.13, at 1-37 (footnotes omitted).

The Second Circuit followed these principles in *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), which reversed a district court's approval of a class action settlement releasing claims that did not arise out of the facts pled in the complaint. There, the district court had certified a class of purchasers of potato futures contracts who liquidated the contracts

[9] This observation was made in connection with the "typicality" requirement of Rule 23(a)(3), as opposed to the adequacy-of-representation requirement of Rule 23(a)(4). As this Court noted in *Amchem*, however, the two tests "tend to merge" and courts frequently discuss both of them together in their class rulings. 117 S. Ct. at 2251, n. 20, quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. at 157 n.13.

between April 13, 1976, and May 7, 1976. The class members alleged that the wrongful conduct of the defendants had depressed the price of those contracts. Class counsel and the defendant agreed to a settlement that released both the claims alleged in the complaint *and* any claims regarding futures contracts that were liquidated *after* May 7, 1976. Over objections, the district court approved the fairness of the settlement. *See id.* at 15.

The Second Circuit, per Judge Friendly, reversed, holding that the representative plaintiffs were empowered to represent the class "solely with respect to the contracts in which all members of the class had a common interest: contracts liquidated between April 13 and May 7." Judge Friendly added that, "if a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Id.* at 17-18. Thus, the Second Circuit held that the authority of the representative plaintiffs under Rule 23 to release claims on behalf of the class is limited by the scope of the class complaint, which describes the claims all class members have in common. *See id.* at 18-19; *see also International Union of Electronic, Electrical, Salaried, Mach., and Furniture Workers v. Unisys*, 155 F.R.D. 41, 48 (E.D.N.Y. 1994) ("*National Super Spuds* thus stands for the proposition that a federal district court may not approve a class-action settlement that seeks to release claims that are inadequately represented by the named plaintiffs"); 7B *Federal Practice* § 1797.1, at 41-42 (quoting *National Super Spuds* with approval and noting that, "[i]n evaluating the fairness and reasonableness of any proposed settlement, the court should make certain . . . that the agreement does not impermissibly waive future claims"); Coffee, *supra*, at 1435 ("Judge Friendly's view in *National Super Spuds* that an atypical plaintiff cannot meet the `adequacy of

representation' standard in Rule 23(a) rests on a sound perception of the conflicts of interest that arise under any contrary rule.")[10]

The proposed settlement in this case violates these basic principles by releasing claims that the class representatives do not hold in common with the rest of the class. Although the class representatives and the unnamed class members they purport to represent share a common defendant, the facts relating to the damages of the class members with "future" claims *have not yet occurred* and will necessarily differ from person to person. Given this radical disparity among the future personal injury claims held by the exposure-only class members, the class representatives in this case cannot adequately represent the broad and varying interests of the future victims encompassed by the class settlement with respect to those claims.

For all these reasons, no matter how "fair" this settlement may have appeared to be to the district court in this case, the fact remains that the class representatives lacked any authority to release the unaccrued personal injury claims of the exposure-only class members. Any other result would fly in the face of due process, which forbids absent class members from being bound by

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[10] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S.Ct. 873, is not to the contrary. There, this Court reversed a decision of the Ninth Circuit refusing to recognize the preclusive effect of a state court class action settlement that released federal claims brought under the Securities Exchange Act of 1934 that the class representatives held in common with the rest of the class and which, under the Exchange Act as construed by the Court, could be released by a state court. 116 S. Ct. at 881-82. In so doing, the Court merely held that the Ninth Circuit erred in refusing to afford full faith and credit to the state court judgment, and did not reach the question of whether the release of federal claims that could not have been pled in the state court proceeding violated due process. In a concurring opinion, Justice Ginsburg stressed that the Court's opinion did not decide whether the class representatives' release of unpled claims violated the absent class members' due process rights, and warned that the issue of adequacy of representation remained open on remand. *See id.* at 885.

a class judgment in which they were represented by individuals "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent." *Hansberry v. Lee*, 311 U.S. at 45. Thus, the settlement in this case violates the constitutional rights of the class members and should not be permitted to stand.

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

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